IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 566

JOSEPH JAMES CARLENO,

Petitioner,

vs.

MARINE TRANSPORT LINES, INC., and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH JAMES CARLENO, *Petitioner,*

vs.

MARINE TRANSPORT LINES, INC., and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph James Carleno, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit, entered on May 15, 1963.

Reports of the Courts Below

The memorandum opinion of Honorable WALTER E. HOFFMAN, U. S. D. J., Judge of the United States District Court for the Eastern District of Virginia, Norfolk Division, dated October 29, 1962, and a final decree in favor of respondents, dated November 19, 1962, are printed in the record below. The opinion of the United States Court of Appeals dated May 15, 1963 is set forth herein: Appendix A. The opinions are reported as *Carleno* v. *Maine Transport Lines, Inc.*, 209 F. S. 859, aff'd., 317 F. 2d 662.

Jurisdiction

Jurisdiction of this court is invoked under Title 28, U. S. C. A. 1254(1) and 2101.

Questions Presented

1. What part, if any, of a disability suffered by a seaman aboard ship due to a mistake of the shipowners' judgment is compensable in damages?

2. Is proof of foreseeability prerequisite as part of the seaman's burden of proof in a maritime damage suit, the same as in an action based on shoreside accidents, failing which proof the shipowner is clothed with immunity from legal responsibility?

3. If a seaman returned to duty while under treatment for ship connected disability, is he thereby barred from further right to maintenance and cure?

4. When the extent of aggravation of ship connected disability cannot be precisely determined, does such lack of certainty destroy the seaman's right to damages?

Reasons for Granting the Writ

The power to protect maritime workers from injury is within the exclusive power of the employer. Accordingly, shoreside concepts which exonerate employers from "unforeseeable" accidents places a legal weapon, as well as a shield in the hands of the employer, thereby lessening his compelling economic interest to take such safety measures as he would were such defenses not available.

The defense that contributing factors beyond the full extent of damage and thereby such uncertainty constitutes a bar to recovery is nothing more nor less than deprivation of the right to recover damages for the effects of preventable accidents.

Maritime workers, whose calling concededly entails most hazardous risks, should be provided with the legal impetus to compel employers to take adequate precautionary measures to prevent accidents.

A maritime worker who suffers injury or disability in the hazardous duties of his calling should not be compelled to bear the devastating physical bankruptcy of his injuries, as well as the economic loss, and in case of death, the burden should be borne by the industry and not by the next of kin of the victim.

Statement

The facts upon which petitioner predicated his Cause of Action and now charges error are literal excerpts from the memorandum opinion by the trial court, United States District Judge WALTER E. HOFFMAN.

In the memorandum opinion dated October 29, 1962, the court stated:

> "Libellant instituted this action against Marine Transport Lines, Inc., as operator, and the United States of America, as owner, of the USNS Muir Woods, for damages allegedly resulting from the negligence of the operator, the unseaworthiness of the vessel, and the purported failure to provide medical care thereby aggravating libellant's condition. Respondent, Marine Transport Lines, has paid all maintenance from the inception of the illness on June 12, 1958, to and including December 18, 1958, at which time libellant was declared fit for duty. Libellant contends that he is entitled to maintenance for an extended period beyond that date."

"On May 13, 1958, libellant was employed as a boatswain aboard the vessel. He underwent the customary pre-employment physical examination and was deter-

mined to be free from disability. On June 8, 1958, the vessel left Savannah, Georgia, en route to Aruba, West Indies. At Aruba, the vessel was to take on fuel and then proceed to a rendezvous with the United States Navy fleet off the coast of Portugal and there to effectuate a fuel transfer operation. Prior to leaving Savannah a shipyard had installed additional manifolds and other special equipment for the foregoing purposes."

"While the vessel was at sea between Savannah and Aruba, libellant was ordered by the chief mate to cause certain hoses to be connected with the additional recently installed manifolds. The purpose of this operation was to expedite the later fueling activities to take place off the coast of Portugal. The ship's master testified that he wanted the work completed before arrival in Aruba in order that the vessel would remain gas-free, thereby eliminating any danger of fire in dragging the hoses over the deck while taking on fuel oil at Aruba or thereafter, but it is apparent that there was no real emergency existing. * * *"

"The duties of a boatswain are primarily of a supervisory nature which do not require the performance of manual labor. Nevertheless, bosuns do engage in work requiring varying degrees of physical effort, all of which is generally done on a voluntary basis to suit the bosun's convenience. His chief function is to lay out the work and to supervise its performance. Consequently prior to June 11, appellant had not done any appreciable physical work which could be related to his subsequent heart attack."

"Some initial preparation was completed by the bosun's work gang on June 10, the day he received his work order. The actual work of moving the hose-

commenced at 1 P.M. on the following day and was completed in approximately four hours. Although not required to perform manual labor, appellant apparently worked along with the other members of the deck department selected by him for this job. After supper that evening appellant went to the storeroom for the purpose of "straightening up a deck locker," and worked voluntarily on an overtime basis for three hours. He stopped working around 9 P.M. when he commenced feeling ill. This was apparently the initial onset of his illness, although he thereafter testified that he did not experience any symptoms of his illness until sometime between 3 A.M. and 4 A.M. the following morning, and this is the information he gave to the physicians who examined him. At that time he awakened with shooting pains in his chest, nausea, and heavy sweating. He went to the purser, who served as the ship's medical officer and, after taking his pulse and temperature,[1] the latter diagnosed his condition as a respiratory infection. Appellant was given 250 milligrams of terramycin, an antibiotic, told to put on a heavy sweatshirt, and sent back to bed. He was instructed to remain in his cabin until the ship docked several hours later and arrangements could be made to secure medical attention. At this time the vessel was entering or about to enter the Port of San Nicholaas, Aruba."

"The purser immediately reported to the officer on watch and chief mate that appellant was not fit for duty until further medical attention was given to him. At approximately 7:30 A.M., when the vessel had docked or was about to dock, the purser went

[1] The pulse rate was about 66; the temperature was approximately 96.6

to check on the appellant and found him in the mess room drinking coffee; his appearance was improved and, according to appellant, he was feeling 'a lot better.' Appellant was given a pass to enable him to see the ship's agents in Aruba and was told to go to the Marine Office, a distance of [illegible] 300 yards away from the vessel. No assistance was offered and none was requested, but appellant was accompanied by another seaman, Ranke, who was in need of treatment for his eye. After visiting the offices of the ship's agents near the pier, appellant and Ranke walked approximately one mile to the office of Dr. Dussenbroek during which time appellant again felt ill. * * *"

"On his return trip from the physician's office, appellant met the purser who looked at the letter from Dr. Dussenbroek recommending hospitalization. The purser told appellant to go back to the ship and pack his gear. Appellant then took a taxi back to the ship, paying for it with money given to him by Ranke. His fellow crew members packed his clothes and carried his gear while he went through Customs and on to the Marine Office. He was then sent by taxi to the hospital where his true condition was ascertained. He was 46 years of age at the time of his attack and has been following the sea for 15 years."

"Libellant remained in the Marine Hospital in Aruba from June 12 until July 28 when he returned by air to New York. For a period of approximately one week he was under treatment in the United States Public Health Service Hospital in New York. He then came to Norfolk and was an outpatient at the Marine Hospital until he was discharged as 'fit for duty' on December 18, 1958."

"Libellant returned to the Main Woods in the early spring of 1959, where he served as a bosun for a period

of four to five weeks until the vessel was withdrawn from service. He later served about 50 days as an ordinary seaman aboard the MARINE PIONEER. During the year 1961 he was employed as a bosun aboard the SS [illegible] for two consecutive voyages consuming a total period of approximately six months. He was then advised to give up his work as a seaman. * * *"

Argument

The Court below determined that the vessel being adequately supplied with falls, winches and other deck appurtenances, reasonably fit for the work ordered, refutes petitioner's charge of unseaworthiness.

But the Court below made no comment on the fact that the Master compelled performance and that the job was actually performed under an accelerated timetable set by the Master in almost unendurable heat without the use of the aforementioned available deck appurtenances to assist petitioner in his designated work.

It would seem that denial of the use of available machinery and equipment designed to alleviate the hardships of manual labor reaches something more than unseaworthiness, but that the conditions under which petitioner was compelled to work were unseaworthy, cannot seriously be questioned. *Mitchell v. Trawler Racer Inc.*, 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941; *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561.

The Court below speaks of the customary function of a boatswain (Pg. 3)[1]:

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[1] The page numbers refer to the opinion of the United States Court of Appeals for the Fourth Circuit, decided May 15, 1962.

"His previous daily occupation had been confined to touring the ship."

and that:

"At intervals Carleno took a hand in the work but for the most part he was simply 'overseeing' the gang, the customary function of a boatswain."

The Court below finds Carleno in the status of a volunteer when he "took a hand in the work." Clearly that finding overlooks the well recognized "law of the sea," that seamen are required to obey orders and use whatever equipment and men are provided to execute the order. The *Arizona* v. *Anelich*, 298 U. S. 110, 56 S. Ct. 707; *Beadle* v. *Spencer*, 298 U. S. 124, 56 S. Ct. 712; *Tampa Interocean S.S. Co.* v. *Jorgensen*, 93 F. 2d 927.

Petitioner's performance of the compelling but unwarranted, unnecessary, strenuous and heart taxing manual labor not consistent with the functions of a boatswain, did not convert his status from a dutybound seaman to a volunteer. Instead it proximately caused his becoming totally and permanently disabled.

The Court below found that notwithstanding the failure to use available mechanical means to assist petitioner in his work, the number of men assigned to the task was sufficient. The lack of sufficient personnel as well as the improvidence of denying petitioner available mechanical means is borne out by the testimony of the Chief Officer of the vessel. He said: (page 9, Deposition of Chief Officer Donald P. Tarr):

"Q. How many would you say that you generally require?

"A. Well, if it's a real heavy hose, we may use four or five possibly, including the man on the *winch*." (Italics supplied).

It is apparent that the estimate made by the Chief Officer was dependent upon the use of the ship's equipment and machinery for assistance in the task without which it is but common sense and logic especially in view of the overbearing heat and the accelerated work, that additional seamen were needed for the job. *The Bark Gentleman*, Olcott 110, Fed. Cas. 5, 324; *Re Meyer*, 74 F. 885; *In Re Pacific Mail S.S. Co.*, 130 F. 56; *The Rolph*, 299 F. 52; *Boudoin v. Lykes Bro. S.S. Co., Inc.*, 348 U. S. 336, 75 S. Ct. 382; *Keen v. Overseas Tank Ship Corp.*, 194 F. 2d 515; *Southern Railway Co. v. Welch*, 247 F. 2d 340, 341; *Bradt v. U. S.*, 122 F. S. 190, 195, 196, aff'd 221 F. 2d 325; *Gold v. Groves*, 182 F. 2d 767.

Petitioner was duty bound to follow orders, perform and complete the assigned task regardless of the conditions. It was duty compounded upon duty. *Bradt v. U. S.*, 122 F. S. 190, aff'd. 221 F. 2d 325. The defense that the unseaworthiness was correctable by the injured victim, injured as a result of such unseaworthiness, is indulging in radical departure from uniform and well established maritime law. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 877, 90 L. Ed. 1099; *Palermo v. Luckenbach S.S. Co.*, 355 U. S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3; *Socony Vacuum Oil Co. v. Smith*, 305 U. S. 424, 59 S. Ct. 262.

The Court below adopted the findings of the Trial Court and in doing so invoked the doctrine of foreseeability as a valid defense in a maritime cause predicated on unseaworthiness. Foreseeability is foreign to a maritime cause predicated on unseaworthiness, the interjection of which without correction could very well result in the breakdown of the principles of law upon which a shipowner is required to provide a seaman a safe place to work. *The Osceola, supra, Seas Shipping Co. v. Sieracki, supra; Mahnich v. Southern S.S. Co., supra; Mitchell v. Trawler Racer Inc., supra.*

Subsequent to the petitioner suffering the onset of his heart disease, he called upon the Purser, the ship's medical officer for treatment. The Court below found that petitioner complained of sharp chest pains, active nausea, chills and profuse perspiration, and, speaking of the purser who attended petitioner after his complaints were reported, stated (p. 5):

> "His misreading of the signs of Carleno's pain did not prove him unqualified. This holds true, too, for the physician in San Nicolaas."

The Trial Court determined that the purser committed an error of judgment in failing to recognize the condition of the petitioner.

It is submitted that although it is not expected of a layman on a vessel to diagnose the exact nature of petitioner's illness, still, symptoms classical to a heart attack are within the realm of that knowledge chargeable to a ship's medical officer. *Spellman* v. *American Barge Line Co.*, 176 F. 2d 716.

Is it less reasonable to demand that a ship's medical officer be aware of the possible ailment behind such symptoms as it is to find him with the alleged ability to diagnose a respiratory infection?

The conceded evidence is that the Purser committed an error in judgment when he failed to recognize the signs of petitioner's condition, but the Court below holds that the result of this error in judgment is to be carried upon the shoulders of the petitioner in addition to the damages he must suffer as a result of the shipowner's judgment error. This theory is untenable and also constitutes a radical departure from uniform, well-established and unquestionable *stare decisis*. *Harden* v. *Gordon*, Fed. Case 6047, 2 Mason 541.

In addition, the Court below depended upon the petitioner's self-diagnosis in exonerating the shipowner for the negligent acts of its ship's medical officer. This too, is in conflict with settled principals. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 642; *Bradt* v. *U. S.*, *supra*.

As part of the shipowner's breach of its non-delegable duty to provide petitioner with prompt, adequate and proper treatment for his illness, is the conceded fact that petitioner was compelled to walk approximately one mile to attain medical treatment. Here, too, the Court below exonerated the shipowner upon the basis of self-diagnosis by the petitioner, although the Court below found that (p. 5):

> "The walk to the physician's office may have been harmful."

The evidence is uncontradicted that the walk, not as the court below said "may have been harmful," it was harmful.

The expression by the Court below "may have been harmful," erroneously reflects the uncontradicted evidence.

It is well settled law that a shipowner is answerable for its negligence and unseaworthiness if it played any part, even the slightest in producing the injury for which damages are sought. *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 72 S. Ct. 443, 1 L. Ed. 2d 493; *Ferguson* v. *Moore McCormack Lines*, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511, and in this regard damages need not be precisely ascertainable. *Hanson* v. *Reiss Steamship Co.*, 184 F. Sup. 545, 550.

The Court below, in denying petitioner extended maintenance and cure, relied upon the fact that he returned to work within a few months after hospitalization. This re-

liance prejudices a seaman's effort at rehabilitation and is not a factor to be considered in determining the right of a seaman to maintenance and cure. *Bright* v. *U. S.*, *supra*; *Hanson* v. *Reis Steamship Co.*, *supra*; *Carlsson* v. *U. S.* 252 F. 2d 352.

The direct cause of petitioner now being permanently disabled was the shipowner's deliberate choice to save money by having the ship's crew do the work which by custom of the trade was that of a shoreside gang, being compelled to do so in haste under overbearing heat with the denial of any mechanical means to assist him. To camouflage such improvidence with "seaman-like forethought," is to sacrifice safety for the benefit of financial gain, and a return of the seaman to a dark age. *The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

The facts of this case do not bear out the conclusion of innocent error of judgment such that would burden the seaman with the results therefrom.

CONCLUSION

The decision by the Court below destroys the progress in line with the definite integrity of Congressional intent in admiralty matters, as pointed out by Judge STORY in *Harden* v. *Gordon*; *supra*; and is explicitly commented on by Mr. Justice MCKENNA in *The Western Maid*, over 40 years ago (257 U. S. 419, 42 S. Ct. 159, 66 L. Ed. 299).

The decision is destructive of well established mariners' rights and constitutes such a breach in well established principles of law as to put in jeopardy the protection of remedial legislation and realistic appreciation of protective measures to keep apace with the dangers which advanced modern technology continuously presents.

So great is the impact of such inroad and conflict with well established law as to merit review by this Court.

It is respectfully urged that there are herein important questions of the interpretation of maritime law such that merits consideration and review by this Honorable Court.

Respectfully submitted,

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On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8907

JOSEPH JAMES CARLENO,

Appellant,

versus

MARINE TRANSPORT LINES, INC., and UNITED STATES OF AMERICA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued March 27, 1963 Decided May 15, 1963.)

Before SOBELOFF, Chief Judge, and BRYAN and BELL, Circuit Judges.

JACOB RASSNER (ISRAEL STEINGOLD on brief) for Appellant, and CHARLES R. DALTON, JR., and ROBERT M. HUGHES, III, (C. V. SPRATLEY, JR., United States Attorney, and SEAWELL, MCCOY, WINSTON & DALTON on brief) for Appellees.

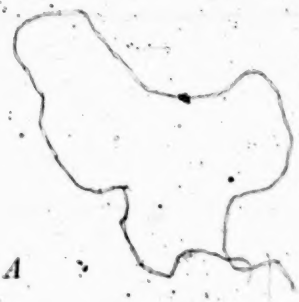
Appendix A

ALBERT V. BRYAN, Circuit Judge:

These maritime torts and broken obligations were laid by the libel of boatswain Carleno to the Marine Transport Lines, Inc. and the United States, respectively operator and owner of the tanker USNS Muir Woods on which he was serving: (1) injury to his heart from overexertion forced upon him through unseaworthiness of the vessel and the negligence of her officers, (2) aggravation of the injury through failure to furnish adequate medical attention, and (3) untimely termination of his maintenance and cure. His claims denied by the District Court, he now appeals but we likewise see no merit in his case.

Passing the pre-voyage physical examination, Carleno signed on the Muir Woods at Norfolk, Virginia, May 13, 1958 and sailed as boatswain. Preparatory to taking on a cargo of fuel oil in the Dutch West Indies for discharge ultimately to a Navy fleet oiler at sea off Lisbon, Portugal, the Muir Woods proceeded to a shipyard in Savannah, Georgia for installation of a "fueling at sea" rig. This consisted, among other items, of four additional manifolds and four nylon hoses. On June 8, 1958, the Muir Woods headed for Aruba, one of the Lesser Antilles, in the Caribbean, just north from Venezuela. Enroute Carleno was ordered to lay out the hoses and secure them to the new manifolds. The hoses had been stowed on the cross-beams of the spar deck, immediately above and open to the main deck where the connections were to be made. While the hoses were for off-loading only, the master with seamanlike forethought preferred to rig them to the manifolds before loading fuel oil. The metal flanges of the hoses when dragged over the steel deck, he feared, might create friction imperiling a cargo not entirely "gas-free."

With preliminary steps for running and fitting the hoses completed on June 10, bo'sun Carleno with six crewmen



turned to at one o'clock on the afternoon of June 11 and by five the trick with the hoses was finished. At intervals Carleno took a hand in the work, but for the most part he was simply "overseeing" the gang, the customary function of a boatswain. His previous daily occupation had been confined to touring the ship.

Off duty after supper, he volunteered to help set things to rights in a deck locker—at over-time compensation for some three hours. About 9 o'clock he turned in for the night. Although he may have been ill then, it is certain that around 4:30 A.M. he had sharp chest pains, active nausea, chills and profuse perspiration. Immediately he went to the purser's office for aid. The purser, who was also ship-board medical advisor, sent him back to his quarters, where shortly he diagnosed Carleno's suffering as a respiratory infection. Given terramycin, he was ordered by the purser to stay abed until after the ship docked that morning in Aruba at San Nicolas.

Returning again to Carleno's cabin before breakfast, the purser found it empty and the patient sitting in the mess room drinking coffee. The bo'sun said he felt a "lot better". A medical service request was made out for him to take to the ship's agent, not far from where the vessel was docked. Afterwards, with a shipmate he walked to the physician's office about a mile away. The doctor thought his sickness a kidney ailment. Except for a walk of two city blocks, he came back to the ship in a cab. By the same means he was then sent to the San Pedro DiVerapo Hospital. There his trouble was determined to be a heart attack.

Hospitalized in San Nicolas until June 28, on that day he was flown to New York for a stay of a week in the Public Health Service Hospital. Then he returned to Norfolk, where he received outpatient attention at the Marine Hospital.

"Fit for duty" was noted on his discharge from the Norfolk hospital December 18, 1958. The Spring of 1959 found him again as bo'sun on the Muir Woods, serving for four or five weeks until the ship was "laid up". Later in 1959 he shipped foreign on another vessel for approximately 50 days as an ordinary seaman. In 1960 he did two round voyages as boatswain on still another transocean vessel for a total of 6 months. Since his last crossing in 1960, he has been kept ashore by his heart condition.

Upon these findings—generously supported by evidence—the District Judge concluded, there was no unseaworthiness in the Muir Woods, no neglect of Carleno, and no maintenance and cure due him beyond December 18, 1958, the date on which he was both fit for duty and had received the maximum cure possible for him.

The unseaworthiness charged in the libel—that the appliances and the manpower furnished were so inadequate he had to exert himself above his strength and so injured his heart—was completely refuted by the overwhelming proof of the good supply and condition of falls, winches and other deck appurtenances which were suitable, if needed, for lowering and laying out the hoses. There were also two booms available though not used because not readied. But if none of this equipment was employed, the evidence still fails to sustain the accusation of unseaworthiness. The length and weight of each section of the nylon hose was approximately 25 feet and 200 pounds. Six crewmen were there to handle the hoses, and the testimony is that three or four could easily move a section into place. Thus the turn was not undermanned, and the boatswain was not overtaxed even if he did occasionally spell the men.

Recovery for negligence here is premised on both the general maritime law and the Jones Act*. The allegation—

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* 46 U.S.C. §688, made applicable to the United States by Suits in Admiralty Act and Public Vessels Act, 46 U.S.C. §§742, 781.

which may also relate to unseaworthiness as well—is lack of worthwhile medical attention on board and in port. A ship's doctor or surgeon in the ship's complement is not required, libelant-appellant concedes, by law, custom or usage in order to meet the standards of good ship-keeping. De Zon v. American President Lines, Ltd., 318 U. S. 660, 668 (1943); The Iroquois, 194 U. S. 240, 242 (1904); The Wensleydale, 41 Fed. 602 (E. D. N. Y. 1890).

Nothing in the record suggests a want of care in selecting the purser, or rates his medical assistance below that prevalent on freighters generally. His misreading of the signs of Carleno's pain did not prove him unqualified. This holds true, too, for the physician in San Nicolas. Scarcely any surgeon, physician or dentist, we surmise, could satisfy such a test. Neither purser nor physician acted carelessly. Not until Carleno's conduct and words assured the purser of his improvement did he acquiesce in the patient's going ashore. Promptly upon his first examination the doctor advised the ship to hospitalize Carleno. The walk to the physician's office may have been harmful. But it was permitted only after the purser had diligently sought to know and safeguard Carleno's condition. No neglect is evinced here.

The upshot was that the District Court was unpersuaded—and quite understandably—either that the heart attack was brought on through any delinquency of the ship, her officers or her agent, or that any of them was inattentive to the bo'sun. The only remaining question is whether maintenance and cure was unjustly abridged.

Maintenance and cure is a seaman's security from the time he is articled. Not dependent upon negligence, unseaworthiness or other things left undone, the doctrine has been so clearly traced and forcefully enunciated from the time of the Black Book of the Admiralty and earlier, that

now it would be supererogation to attempt a dissertation upon the principle. Farrell v. United States, 336 U. S. 511 (1949). But there is still the difficulty of adjusting its duration.

With the District Judge, we think the evidence warranted an end to Carleno's allowance on December 18, 1958. Of course, the certification of his capability as of that date is not conclusive. But it is a consideration of quite some import. Especially when within a few months and for the next two years he ships in the rugged service of an ordinary sailor as well as in the less rigorous life of a bo'sun. Additionally, there is acceptable expert testimony that he had by that date "achieved maximum benefit at that time available" of medical treatment. It is imperative to be mindful that the defendants did not inflict or aggravate the heart impairment; hence the period of maintenance and cure is not to be extended beyond the point of maximum recovery merely because the impairment remains. The obligation is fulfilled when subsistence and medical care are furnished to the point where remedial medicine and surgery can do no more. Farrell v. United States, *supra*, 336 U. S. 511; see Morewitz v. S.S. Matador, 306 F. 2d 144, 147 (4 Cir. 1962).

Sound and fair, the judgment of the District Court will be affirmed.

Affirmed.

APPENDIX B

Decree

Filed and Entered May 15, 1963.

UNITED STATES COURT OF APPEALS
for the
FOURTH CIRCUIT

No. 8907.

JOSEPH JAMES CARLENO,

Appellant,

vs.

MARINE TRANSPORT LINES, INC., and UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the records from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same

is hereby affirmed; and that the costs on appeal, except the costs of the United States of America, be paid by the appellant.

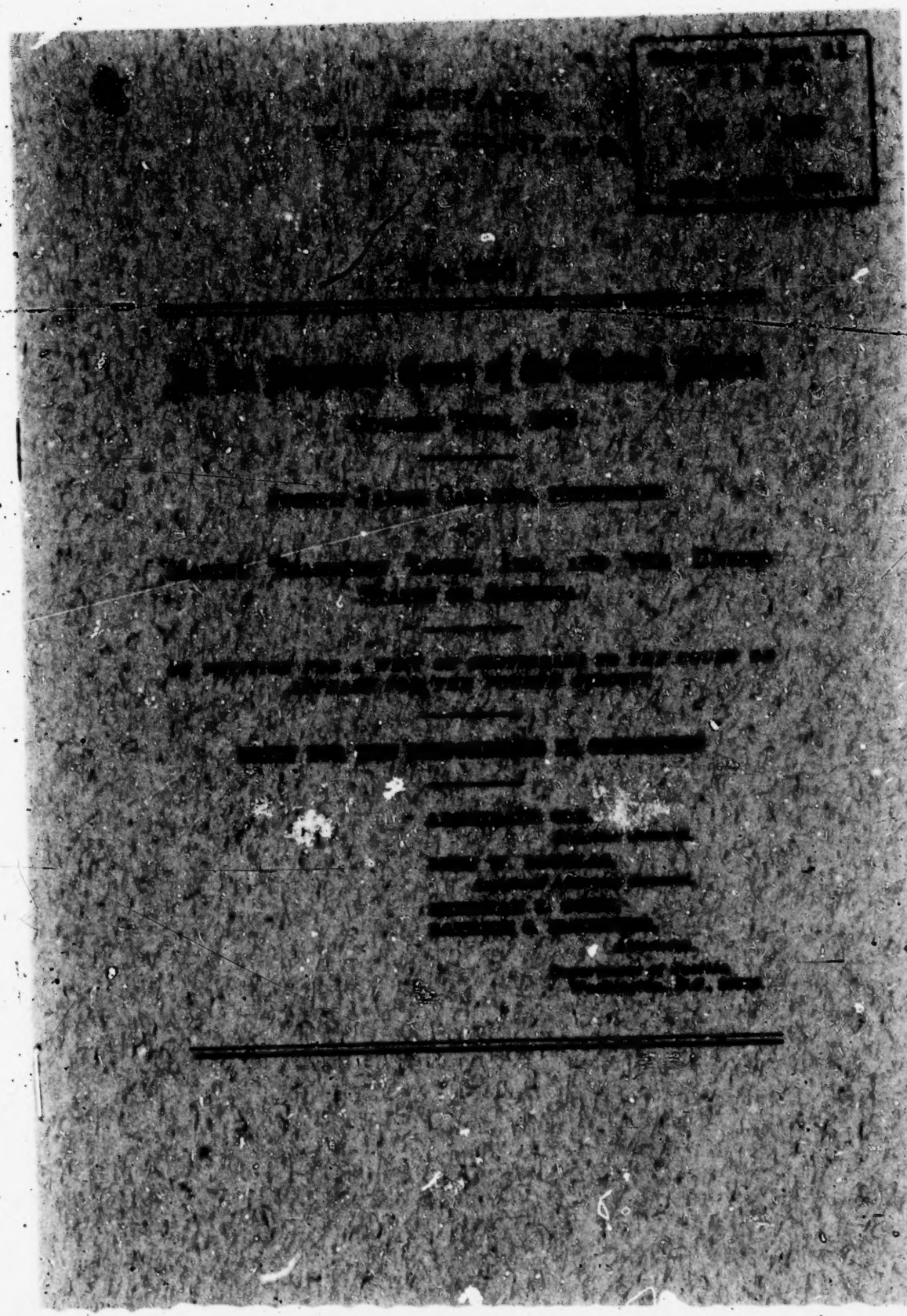
/s/ Simon E. Sobeloff
Chief Judge, Fourth Circuit.

/s/ Albert V. Bryan
United States Circuit Judge.

/s/ J. Spencer Bell
United States Circuit Judge.

Filed—May 15, 1963.

R. H. F. Williams, Jr.
Clerk.



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 366

JOSEPH JAMES CARLENO, PETITIONER

v.

MARINE TRANSPORT LINES, INC. AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 209 F. Supp. 859 and is set out in the brief filed by the United States as appellee below (Br. App. 1-14). The opinion of the court of appeals (Pet. App. 15-20) is reported at 317 F. 2d 662.[1]

[1] "Br. App." refers to the appendix to the brief filed by respondent as appellee in the court below. "Pet." refers to petitioner's petition in this Court. "Pet. App." refers to the appendix thereto.

707-857—63

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1963. The petition for a writ of certiorari was filed on August 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly found that petitioner's heart attack was not caused or aggravated by any unseaworthy condition of the ship on which he was employed or by the negligence of its officers.

2. Whether the district court properly found that petitioner had reached the point of maximum cure when he was declared "fit for duty" and re-employed as a seaman.

STATEMENT

Petitioner instituted this action against Marine Transport Lines, Inc., as operating agent, and the United States, as owner, of the United States Naval Ship MUIR WOODS, for damages arising out of a heart attack sustained aboard the vessel. Petitioner alleged that the attack was caused by overexertion attributable to the unseaworthiness of the vessel and the negligence of her officers, and that it was aggravated by failure to furnish adequate medical attention. He also claimed damages for the untimely termination of his maintenance and cure. Petitioner's libel was dismissed by the district court, and the court of appeals affirmed (Pet. App. 16).

The district court's findings of fact, which the court of appeals held to be "generously supported by evidence" (Pet. 18), may be briefly summarized:

Petitioner was employed as a boatswain aboard the MUIR WOODS, and, as such, his duties were primarily supervisory in nature. Prior to entering on this employment, petitioner underwent a physical examination and was found to be free from disability. On June 11, 1958, while the MUIR WOODS was bound out of Savannah, Georgia, en route to Aruba, West Indies, petitioner was ordered by the chief mate to see that certain hoses, which were to be used in the transfer of fuel, were rigged to manifolds upon the deck. As boatswain, petitioner's duties in such an operation were to "lay out" the work and guide it to a successful completion. Petitioner made no complaint regarding the work assigned. He had at his disposal the entire deck crew of ten men for the execution of the order, and from this group he chose six for the task. The choice of method to accomplish the work was also petitioner's responsibility. The ship's booms were not rigged at that time so as to be employable in the moving of the hoses, but handy-billies (block and tackle arrangements) were available, as were winches and whips. The evidence warranted a finding that three to six men could perform the work without too much difficulty even without the use of mechanical devices. Although there was additional manpower available if needed, and although his duties were only supervisory, petitioner joined in the manual labor of moving and rigging the hoses. The job was

completed in about four hours without incident, and there was nothing unusual about it although it was performed in extremely hot weather.

During that evening petitioner volunteered for three hours of overtime work straightening a deck locker. He retired for the night around 9:00 p.m. Between 3:00 and 4:00 a.m., petitioner awoke suffering from pains in his chest, nausea, and profuse perspiration. He went to the purser's cabin for treatment since the purser served as the ship's medical officer. The purser, who was not a physician, diagnosed petitioner's condition as a respiratory infection, administered an antibiotic, and told petitioner to return to bed and to remain there until the ship docked the following day and he could secure medical attention in Aruba.

The purser immediately reported to the first mate that petitioner was not fit for duty until further medical attention was given him. Before breakfast that morning, as the vessel was docking, the purser went to check on petitioner and found him in the messroom drinking coffee. Petitioner's appearance was improved, and he stated that he was feeling "a lot better." Petitioner was then sent ashore to visit a doctor, accompanied by a fellow seaman. Petitioner asked for no assistance and made no complaint about walking to the doctor's office, which was about one mile from the dock. The doctor diagnosed his ailment as a kidney condition, and he arranged for hospitalization. In the hospital it was determined that petitioner had suffered a heart attack.

Following his initial hospitalization in Aruba for about a month-and-a-half, petitioner returned to the United States and was placed in a Public Health Service hospital for one week. He continued under medical care as an out-patient until December 18, 1958, when he was released and certified as "fit for duty." Prior to that date, on December 3, petitioner was examined by a physician who expressed the opinion that petitioner then had received the maximum possible benefit from medical care.

In the spring of 1959, having been declared fit for duty, petitioner returned to the MUIR WOODS, and served as boatswain for approximately five weeks. Thereafter, he served both as boatswain and ordinary seaman on various ships in 1960 and 1961, until he was advised to give up his work as a seaman and brought this action.

ARGUMENT

Notwithstanding the petition's failure to say so expressly, the petitioner in this case is seeking to have this Court review the sufficiency of the evidence to sustain the district court's findings, made upon proper criteria, (1) that the petitioner's heart attack was not caused or aggravated by any unseaworthy condition of the ship, (2) that the purser's failure to diagnose petitioner's ailment correctly did not constitute negligence, and (3) that maintenance and cure were properly terminated when petitioner was declared "fit for duty" and returned to his earlier employment as a seaman. None of these factual determinations, which were fully concurred in by the court of appeals, is appropriate for review by this Court.

1. With respect to the finding concerning the reason for petitioner's heart attack, petitioner urges several grounds in support of the claim that unseaworthiness was the cause. All of these, including the alleged "accelerated timetable" (Pet. 7), "denial of the use of available machinery" (Pet. 7), "almost unendurable heat" (Pet. 7), "lack of sufficient personnel" (Pet. 8), and the implication that petitioner was "duty bound" (Pet. 9) to perform manual labor, are either in square conflict with the record facts or were considered and rejected by the district court. The court summarized its findings as follows (Br. App. 6):

> There was no improvident order; there was no command that the libellant participate in the required manual labor; there was no improper or unsafe place to work; there was no breach of any duty; there was no shortage of manpower; there was no lack of adequate and properly maintained equipment with which to do the work; the ship's owners and officers had no knowledge of any pre-existing heart disease before the libellant undertook the task of moving the hoses. * * *

There was, as the court of appeals observed, generous support in the record for these findings. Hence, as in the recent case of *Morales* v. *City of Galveston*, 370 U.S. 165, 171, "[t]he trier of facts ruled, under proper criteria, that the [vessel] was not in any manner unfit for the service to which she was to be put * * *." The court of appeals correctly held that these findings were not clearly erroneous, *McAllister* v. *United States*, 348 U.S. 19, 20-21, and the concurrent findings of the two lower courts on the factual issue of unseaworthiness should

not be disturbed here, *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 98–99.

2. Petitioner also contends that the purser must have been negligent in failing to recognize symptoms allegedly "classical to a heart attack (Pet. 10). The district court's finding to the contrary is clearly supported by the record. Significantly, a licensed medical doctor in Aruba mistook these "classical" symptoms for those of a kidney ailment (Br. App. 15–16), and it was not until petitioner was hospitalized and thoroughly examined that the correct diagnosis was made (Br. App. 5). Moreover, the purser ordered petitioner to remain in bed until the ship docked, and he reported to the first mate that the petitioner was unfit for duty. There was nothing more that could be done aboard the vessel. Contrary to the purser's instructions, petitioner did not remain in bed, but arose and reported that he felt "a lot better" (Br. App. 25–26). The district court could surely find that the purser acted reasonably in believing that petitioner's condition had improved and sending him ashore to walk a short distance to a doctor's office. Accordingly, this finding of fact, concurred in by two lower courts, requires no further review.

3. Petitioner's contention that the district court erred in finding that his right to maintenance and cure terminated on December 18, 1958, also concerns only findings of fact. Maintenance and cure continue only until the seaman is "so far cured as possible." *Farrell* v. *United States*, 336 U.S. 511, 518.

Maximum recovery is that point in the course of cure when remedial medicine can do no more. *Morcwitz* v. *S.S. Matador*, 306 F. 2d 144 (C.A. 4), certiorari denied, 372 U.S. 906; *Maruaga* v. *United States*, 172 F. 2d 318 (C.A. 2). The finding of the district court as to the date of maximum recovery was based on medical testimony (Br. App. 35–36), on a Public Health hospital certification that petitioner was "fit for duty" on that date (Br. App. 5, Pet App. 20), and on his actual return to work shortly thereafter (Br. App. 17–20). It presents no issue appropriate for review by this Court.

4. Petitioner also appears to contend that the district court erroneously applied a "doctrine of foreseeability" to the unseaworthiness claim (Pet. 9). This assertion is based upon a misreading of the district court's opinion. Both references in the opinion to what was "reasonably foreseeable" or what could be "reasonably anticipated" (Br. App. 6, 9) relate to allegations of negligence, as appears clearly from the sentences which follow those in which foreseeability is discussed. In each instance the context demonstrates that the court was considering claims that the vessel's officers had acted negligently—first in not ordering petitioner to desist from manual labor, and then in issuing an improvident order. Neither related to any claim based upon the ship's alleged unseaworthy condition.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1963.

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